

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matters of

International Comparison and Survey	)	GN Docket No. 09-47
Requirements in the Broadband Data	)	
Improvement Act	)	
	)	
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
	)	
Inquiry Concerning the Deployment of	)	GN Docket No. 09-137
Advanced Telecommunications Capability	)	
to All Americans in a Reasonable and	)	
Timely Fashion, and Possible Steps to	)	
Accelerate Such Deployment Pursuant to	)	
Section 706 of the Telecommunications	)	
Act of 1996, as Amended by the	)	
Broadband Data Improvement Act	)	

**COMMENTS OF SUNESYS, LLC – NBP PUBLIC NOTICE #7**

SUNESYS, LLC

Alan G. Fishel  
Jeffrey E. Rummel  
Arent Fox LLP  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036-5339  
(202) 857-6000

November 6, 2009

## **TABLE OF CONTENTS**

<b>INTRODUCTION AND SUMMARY .....</b>	<b>1</b>
<b>DISCUSSION .....</b>	<b>3</b>
I.    Broadband Deployment is Critical to the Future of this Country, and Timely and Reasonable Priced Access to Necessary Governmental Rights of Way is Critical to Such Deployment.....	3
II.   With Respect to Several Fundamental Issues, there is Substantial Disagreement as to the Proper Interpretation of Section 253 .....	5
A.   Whether Governmental Conduct that Materially Inhibits or Limits the Ability of any Competitor or Potential Competitor to Compete in a Fair and Balanced Legal and Regulatory Environment Constitutes a Violation of Section 253(a) .....	6
B.   Whether Local Governments are Permitted to Charge Providers More than the Authority's Costs for Use of the Rights of Way, and if so What are the Limits on the Charges .....	7
C.   Whether Fees that Are Discriminatory or Unreasonable Automatically Violate Section 253 .....	7
D.   Whether the Scope of Local Governments' Rights of Way Management is Limited to the Items Listed in the Commission's Prior Orders, and, if not, What are the Limits .....	8
E.   Whether the Commission Has the Authority to Preempt Conduct under Section 253 Where a Local Government Seeks to Raise a Defense under Section 253(b) or (c) .....	9
III.  The Commission Should Clarify the Proper Interpretation of Section 253 as to the Fundamental Issues Discussed Above .....	10
<b>CONCLUSION .....</b>	<b>11</b>

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matters of

International Comparison and Survey	)	GN Docket No. 09-47
Requirements in the Broadband Data	)	
Improvement Act	)	
	)	
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
	)	
Inquiry Concerning the Deployment of	)	GN Docket No. 09-137
Advanced Telecommunications Capability	)	
to All Americans in a Reasonable and	)	
Timely Fashion, and Possible Steps to	)	
Accelerate Such Deployment Pursuant to	)	
Section 706 of the Telecommunications	)	
Act of 1996, as Amended by the	)	
Broadband Data Improvement Act	)	

**COMMENTS OF SUNESYS, LLC – NBP PUBLIC NOTICE #7**

**INTRODUCTION AND SUMMARY**

Sunesys, LLC (“Sunesys”) hereby submits its comments in response to Questions 3(a), (c), and (e) of Public Notice No. 7 (the “Public Notice”) in this proceeding.<sup>1</sup>

In the Public Notice, the Commission seeks information regarding, among other things, how the cost and timing of broadband deployment is impacted by providers’ ability (or inability) to obtain timely and reasonably priced access to necessary

---

<sup>1</sup> Comment Sought on the Contribution of Federal, State, Tribal, and Local Government to Broadband, NBP Public Notice #7, GN Docket Nos. 09-47, 09-51, 09-137 (released September 25, 2009).

governmental rights of way.<sup>2</sup> In a similar vein, the Commission also inquires as to how the case by case approach of resolving disputes under 47 U.S.C. § 253 (“Section 253”), which is the law that governs issues concerning providers’ access to governmental rights of way, has impacted the cost and pace of broadband deployment, and whether the process for resolving disputes can be improved.<sup>3</sup>

The answers to these questions are as follows:

1. Disputes regarding access to necessary governmental rights of way greatly delay and undermine the deployment of broadband service.
2. The case by case approach of resolving Section 253 disputes does not work very well because there are tremendous disagreements as to fundamental issues concerning the proper interpretation of the law. These disagreements concern, among other things, issues relating to (i) the appropriate standard under Section 253(a); (ii) the limits on charges for access to the rights of way; (iii) whether discriminatory and unreasonable fees may be permissible; (iv) the scope of local governments’ rights of way management; and (v) the extent of the Commission’s authority under Section 253.
3. The process for resolving disputes under Section 253 can be greatly improved, while the number of disputes can be significantly minimized, by clarifying the law with respect to these fundamental issues.

The Commission itself has recognized the benefits of providing long-needed clarity to Section 253. In recommending that the Supreme Court deny two petitions for certiorari relating to Section 253, the Commission just this year stated that its authority extends “to help correct and unify the interpretation and application of Section 253.”<sup>4</sup> The time to act on such authority is now, as the critical goal of broadband deployment will continue to be greatly hindered otherwise.

---

<sup>2</sup> Public Notice, Questions 3(a), (c), and (e).

<sup>3</sup> *Id.*, Question 3(e).

<sup>4</sup> Brief for the United States as Amicus Curiae at 9, *Level 3 Communications, LLC v. City of St. Louis, Sprint Telephony PCS v. San Diego County, CA*, Nos. 08-626 & 08-759 (U.S. filed May 28, 2009) (“*FCC Amicus Brief*”).

## DISCUSSION

The following statements are indisputable:

1. Broadband deployment is critical to the future of this country, and timely and reasonably priced access to necessary governmental rights of way is critical to the deployment of broadband. Accordingly, local governments are the primary gatekeepers with respect to the deployment of broadband facilities.
  2. There continue to be substantial disagreements as to the proper interpretation of Section 253 with respect to many fundamental issues.
  3. The continued substantial uncertainty as to the proper interpretation of Section 253 has led to significant disputes, delays and confusion, and serves to undermine broadband deployment.
- I. Broadband Deployment is Critical to the Future of this Country, and Timely and Reasonable Priced Access to Necessary Governmental Rights of Way is Critical to Such Deployment

As the Commission has correctly stated on countless occasions in a multitude of proceedings, broadband deployment is critical to the future of this country in so many regards.<sup>5</sup> Not one party has ever contradicted this assertion.

It is equally clear that timely and reasonably priced access to necessary governmental rights of way is critical to broadband deployment. The Commission has repeatedly recognized this fact, stating just a little over a month ago that “the cost of obtaining ... rights of way may have a significant impact on fiber deployment,”<sup>6</sup> and further recognizing that there can be increased broadband deployment “through reduction

---

<sup>5</sup> See, e.g., *In re A National Broadband Plan for our Future*, Notice of Inquiry, GN Docket No. 09-51 (2009) at ¶¶ 4, 9 (The Commission acknowledges that “[n]ew, innovative broadband products and applications ... are fundamentally changing not only the way Americans communicate and work, but also how they are educated and entertained, and care for themselves and each other.” The Commission is developing a plan for the “use of broadband infrastructure and services in advancing a broad array of public interest goals, including consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.”).

<sup>6</sup> Federal Communications Commission, September 29 Report at Open Meeting, at 50 (“FCC September 29, 2009 Report”).

in cost or increase in supply of key inputs affected by government, such as spectrum, ROWs.”<sup>7</sup> Earlier this year, the Commission even acknowledged that “[t]imely and reasonably priced access to ... rights of way is critical to the buildout of broadband infrastructure in rural areas.”<sup>8</sup> Indeed, Section 253 itself was enacted because of the recognition of the importance to providers of timely and reasonably priced access to governmental rights of way.<sup>9</sup> Without the need for such access, there would have been no need for Section 253.

The need for the Commission to clarify the standards relating to timely and reasonably priced access to necessary governmental rights of way was again demonstrated only a few months ago, when Level 3 Communications, LLC filed a petition requesting that the Commission declare that certain rights of way rents imposed by the New York State Thruway Authority are preempted under Section 253 (the “Level 3 Petition”).<sup>10</sup> Many of the commenters in that proceeding (the “Level 3 Proceeding”) also recognized what the Commission has acknowledged on many occasions, namely the critical importance of timely and reasonably priced access to governmental rights of way in connection with the provision of broadband deployment.<sup>11</sup>

---

<sup>7</sup> FCC September 29, 2009 Report at 13. The Commission also recognized the importance of rights of way issues in its request for comment regarding the broadband plan. See *In re A National Broadband Plan for our Future*, GN Docket 09-51 at 50 (2009).

<sup>8</sup> Report on a Rural Broadband Strategy, GN Docket No. 09-29 at ¶ 157 (rel. May 27, 2009).

<sup>9</sup> As the Commission correctly recognizes, Section 253 is “an important and powerful tool” in implementing the goals of the 1986 Act, which include advancing competition in telecommunications markets. Memorandum Opinion and Order, *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, ¶ 106 (1997) (“*TCI Order*”).

<sup>10</sup> “Petition for Declaratory Ruling that Certain Right-of-Way Rents Imposed by the New York State Thruway Authority are Preempted under Section 253” filed by Level 3 Communications, LLC, WC Docket No. 09-153 (Filed July 23, 2009).

<sup>11</sup> Comments of AT&T Inc., WC Docket No. 09-153 (October 15, 2009) (“AT&T Comments”) at 3-4; Comments of Verizon and Verizon Wireless, WC Docket No. 09-153 (October 15, 2009) (“Verizon Comments”) at 1-4; Comments of Qwest Communications International, Inc., WC Docket No. 09-153 (October 15, 2009) (“Qwest Comments”) at 1, 2; Comments of Comptel, WC Docket No. 09-153 (October 15, 2009) at 5; Comments of American Fiber Systems, Inc., WC Docket No. 09-153 (October 15, 2009) at

II. With Respect to Several Fundamental Issues, there is Substantial Disagreement as to the Proper Interpretation of Section 253

As the Commission has recognized, Section 253 “establishes a statutory framework to eliminate state and local measures that thwart the development of competition.”<sup>12</sup> However, as exemplified by the comments filed in the Level 3 Proceeding, and as discussed below, even though Section 253 was promulgated 13 years ago, there are still substantial disagreements as to the proper interpretation of the law on the following fundamental issues:

- Proper Standard under Section 253(a) -- Whether Governmental Conduct that Materially Inhibits or Limits the Ability of any Competitor or Potential Competitor to Compete in a Fair and Balanced Legal and Regulatory Environment Constitutes a Violation of Section 253(a).
- Limit on Charges for Rights of Way -- Whether Local Governments are Permitted to Charge Providers More than the Authority’s Costs for Use of the Rights of Way, and if so what are the Limits on the Charges?
- Discriminatory and Unreasonable Fees -- Whether Fees that Are Discriminatory or Unreasonable Automatically Violate Section 253.
- Scope of Local Government Rights of Way Management -- Whether the Scope of Local Governments’ Rights of Way Management is Limited to the Items Listed in the Commission’s Prior Orders, and, if not, what are the Limits?
- Extent of the Commission Authority -- Whether the Commission Has the Authority to Preempt Conduct Under Section 253 Where a Local Government Seeks to Raise a Defense under Section 253(b) or (c).

---

1-3; Comments of United States Telecom Association, WC Docket No. 09-153 (October 15, 2009) (“USTA Comments”) at 4-5.

<sup>12</sup> Memorandum Opinion and Order, *Public Utility Commission of Texas*, 13 FCC Rcd 3460, ¶ 21 (1997) (“PUC of Texas Order”).

A. Whether Governmental Conduct that Materially Inhibits or Limits the Ability of any Competitor or Potential Competitor to Compete in a Fair and Balanced Legal and Regulatory Environment Constitutes a Violation of Section 253(a)

The Commission has repeatedly interpreted Section 253(a)<sup>13</sup> to bar any regulation that “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment,”<sup>14</sup> and many courts agree with the Commission as to this construction of the law.<sup>15</sup> As a result of this interpretation, the Commission has taken a common sense -- and pro-deployment -- approach and struck down (or cast doubt over) a number of legal requirements that did not literally prevent a provider from providing service.<sup>16</sup>

However, a recent Ninth Circuit case, *Time Warner Telecom of Oregon, LLC v. City of Portland*, has now added to the confusion regarding the proper interpretation of Section 253(a), as the court in *Time Warner* reasoned that Section 253(a) was not violated because the provider was continuing to operate and was thus not completely

---

<sup>13</sup> Section 253(a) provides that “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”

<sup>14</sup> See Memorandum Opinion and Order, *California Payphone Association*, 12 FCC Rcd 14191, ¶ 38 (1997) (“*California Payphone Assoc. Order*”); *PUC of Texas Order* ¶ 22; *TCI Order* ¶ 98.

<sup>15</sup> *Level 3 Communications v. City of St. Louis*, 477 F.3d 528, 533 (8<sup>th</sup> Cir. 2007) (a requirement that materially interferes with a carrier’s ability to compete in a fair and balanced market violates Section 253(a)); *P.R. Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1<sup>st</sup> Cir. 2006) (same); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (citing *California Payphone Assoc. Order*); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10<sup>th</sup> Cir. 2004).

<sup>16</sup> See, e.g., *PUC of Texas Order*, ¶¶ 74-75 (Commission ruled that Section 253 preempted a state law requirement that new local telecommunications companies must use some facilities not owned by the incumbent); Memorandum Opinion and Order, *Petition of the State of Minnesota*, 14 FCC Rcd 21697, ¶ 22 (1999) (“*Minnesota Order*”) (Commission raised doubt over validity of an agreement providing a developer with exclusive access to certain rights of way alongside a highway, because the agreement could harm facilities-based providers, as the evidence indicates that rights of way other than the highway rights-of-way would be substantially more expensive); *Western Wireless Corporation*, 15 FCC Rcd 16227 ¶¶ 7, 8(2000) (Commission stated that a universal funding mechanism that only benefited incumbent LECs would likely violate Section 253(a)); *TCI Order*, ¶ 105 (Commission expressed concern regarding validity of provisions that required “franchisees to interconnect with other telecommunications systems in the city for the purposes of facilitating universal service, provide[d] for regulation of the fees charged for interconnection, and mandate[d] ‘most favored nation’ treatment for the [municipality].”).



barred from providing service.<sup>17</sup> That case is directly at odds with the Commission's prior holdings. The Commission itself, apparently recognizing that the law in this area needs to be clarified consistent with the manner in which it has previously ruled, recently stated that an interpretation of Section 253 requiring a party to prove that it has been completely excluded from providing service "would create a serious conflict with the Commission's understanding of Section 253(a), and it would undermine the federal competition policies that the provision seeks to advance."<sup>18</sup>

B. Whether Local Governments are Permitted to Charge Providers More than the Authority's Costs for Use of the Rights of Way, and if so What are the Limits on the Charges

The law is unsettled as to whether local governments can charge only their costs for use of their rights of way, or whether they can make a profit on such use, and if they can make a profit, what are the limits on their charges (for example, can a locality charge a percentage of the provider's revenues or are such charges limited to a cost-based formula, such as cost plus a reasonable administrative fee).<sup>19</sup> It is startling that 13 years after the adoption of the 1996 Act, the cost issue still has not been definitely resolved.

C. Whether Fees that Are Discriminatory or Unreasonable Automatically Violate Section 253

Providers claim that local governmental fees that are discriminatory or unreasonable automatically violate Section 253.<sup>20</sup> Local governments, on the other hand,

---

<sup>17</sup> *Time Warner Telecom of Oregon, LLC v. City of Portland*, 322 Fed. Appx. 496 (9<sup>th</sup> Cir. 2009).

<sup>18</sup> *FCC Amicus Brief* at 12.

<sup>19</sup> Compare ATT Comments at 19-20 for examples of cases that either limit charges to the local government's costs or strike down revenue-based fees, to Comments of the City of New York, WC Docket No. 09-153 (October 15, 2009) ("NYSTA Comments") at 26-30 for examples of cases permitting charges in excess of costs.

<sup>20</sup> See, e.g., Verizon Comments at 12-21; AT&T Comments at 18-19; Qwest Comments at 7-9. Congress also expressed its intent to preempt discriminatory rights of way fees. See, e.g., S. REP. NO. 103-367, at 56 (1994) ("Currently, one barrier to the deployment of competitive networks has been the unequal treatment by certain local governments of incumbent network providers and new entrants in the assessment and

contend that such unreasonable and discriminatory fees are permissible under the law so long as they do not otherwise violate Section 253(a).<sup>21</sup> This fundamental issue needs to be resolved as well.

D. Whether the Scope of Local Governments' Rights of Way Management is Limited to the Items Listed in the Commission's Prior Orders, and, if not, What are the Limits

In the TCI Order, the Commission held that appropriate rights of way management included "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them."<sup>22</sup> Similarly, in *In re Classic Telephone*, the Commission found that the legislative history sheds light on permissible rights of way management functions under section 253, as the Commission stated as follows:

During the Senate floor debate on section 253(c), Senator Feinstein offered examples of the types of restrictions that Congress intended to permit under section 253(c), including State and local legal requirements that: (1) regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts; (2) require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies; (3) require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation; (4) enforce local zoning regulations; and (5) require a company to indemnify the City against any claims of injury arising from the company's excavation.<sup>23</sup>

---

collection of local franchise fees in connection with the use of public rights-of-way."); H.R. REP. NO. 104-204, at 75 (1995) ("The purpose of [a neutrality provision] is to create a level playing field for the development of competitive telecommunications networks. Harmonizing the assessment of fees from all providers is one means of creating this parity").

<sup>21</sup> See, e.g., NYSTA Comments at 32-33.

<sup>22</sup> TCI Order ¶ 103.

<sup>23</sup> *In re Classic Telephone*, 11 FCC Rcd 13082, 13019 ¶ 39 (1996).

Notwithstanding these FCC Orders, local governments today often overreach with respect to their rights of way management, and in numerous instances such efforts have been struck down by the courts, including in the following circumstances:

- Requirements that a provider supply extra capacity for the municipality.
- Laws that provide local governments with virtually unlimited discretion with respect to whether to grant access to rights of way.
- Laws providing a local government with virtually unlimited discretion with respect to removal rights (with regard to the providers' facilities) after access has been granted.<sup>24</sup>

The Commission should also confirm not only which types of regulations are permissible, but also when they may be challenged. That is, the Commission should confirm that laws that govern initial entry can be challenged before they have any harmful effect.

E. Whether the Commission Has the Authority to Preempt Conduct under Section 253 Where a Local Government Seeks to Raise a Defense under Section 253(b) or (c)

Providers believe that the Commission has the power to decide whether to preempt local governmental action under Section 253, even where a local governmental entity claims that its action is protected under Section 253(b) or (c).<sup>25</sup> On the other hand, local governments argue that if they raise a defense under Section 253(b) or (c), the Commission is powerless to decide the issue, and only a court can address it.<sup>26</sup> Of course, knowing what is the proper forum for the resolution of Section 253 disputes is critical to addressing any of the above issues in contention, and thus this area of disagreement must also be resolved.

---

<sup>24</sup> See AT&T Comments at 5 & n. 9, 11 and 13.

<sup>25</sup> See Level 3 Petition at 28-30; AT&T Comments at 14, 18; Verizon Comments at 13-15.

<sup>26</sup> See, e.g., NYSTA Comments at 14-19; Comments of the City of New York, WC Docket No.09-153 (October 15, 2009) at 1-7.

III. The Commission Should Clarify the Proper Interpretation of Section 253 as to the Fundamental Issues Discussed Above

Given the critical importance of broadband deployment to the future of this country, and the need for broadband providers to have access to governmental rights of way on a timely basis and at a reasonable cost, it is extremely important that disputes regarding access and fees be kept to a minimum. But that can only occur if the law under Section 253 is clarified on the fundamental issues set forth in Section II above. Without such clarifications, these issues will be litigated time and time again, to the benefit of no one – and to the tremendous detriment of broadband consumers and the Commission’s goal of broadband deployment.<sup>27</sup> There is no upside whatsoever to having these fundamental issues continue to be left unresolved – thirteen years after the passage of the 1996 Act. The time to address these matters, and clarify the law, is now. Uncertainty only discourages investment, creates additional delay, and forces providers to expend significant resources on litigation and dispute resolution, rather than on broadband deployment itself.<sup>28</sup>

It is Sunesys’ understanding that the Commission recognizes the need to resolve these issues. As discussed earlier, in recommending that the Supreme Court deny two petitions for certiorari relating to Section 253, the Commission stated that it can use its authority “to help correct and unify the interpretation and application of Section 253.”<sup>29</sup> Sunesys strongly urges the Commission to exercise that authority and take such action

---

<sup>27</sup> As the Level 3 Petition, and the comments filed therein, demonstrate there are numerous efforts by localities to impose unreasonable restrictions on providers. See Level 3 Petition; Verizon Comments at 5-7; AT&T Comments at 11-12; Qwest Comments at 3-7.

<sup>28</sup> Moreover, localities are also best-served understanding what their obligations and limitations are.

<sup>29</sup> *FCC Amicus Brief* at 9.

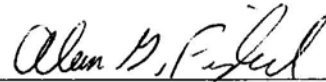
now, and clarify the law on these fundamental issues that substantially deter timely and widespread broadband deployment.<sup>30</sup>

### **CONCLUSION**

For all of the foregoing reasons, the Commission should promptly clarify the law under Section 253 as to the fundamental issues discussed herein.

Respectfully submitted,

SUNESYS, LLC



Alan G. Fishel

Jeffrey E. Rummel

Arent Fox LLP  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036-5339  
(202) 857-6000

Dated: November 6, 2009

---

<sup>30</sup> In fact, the Commission has previously raised concern that “local governments may be creating an unnecessary ‘third tier’ of telecommunications regulation that extends far beyond the statutorily protected municipal interests in managing the public rights-of-way.” TCI Order ¶ 102.